(3)

89-1809

NUMBER_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

H. VAUGHN TOWNSEND, M.D., ROGER D. ANDERSON, M.D., MICHAEL G. WADE, M.D., PATRICK W. HOLBERT, M.D., JAMES T. CAMPAGNA, M.D., DR. RALPH E. MAYBERRY, JACK A. PASQUALE, M.D., BRIAN A. BYRNE, M.D., on their own behalves and on behalf of all others similarly situated, and St. George's University School of Medicine and Ross University

Petitioners

Vs.

HENRY G. CRAMBLETT, M.D., PETER LANCIONE, M.D., LEONARD L. LOUSHIN, M.D., LUCY O. OXLEY, M.D., JOSEPH P. YUT, M.D., JOHN H. BUCHAN, D.P.M., WILLIAM H. JOHNSTON, DEIRDRE O'CONNOR, M.D., CAROL ROLFES, R.N., AND JOHN E. RAUCH, D.O.

Respondents

Vs.

and

OHIO STATE MEDICAL BOARD

Defendant

APPENDIX II

Bernard Joseph Ferguson
Council of Record
7 Essex Drive
Westerly, RI 02891
(401) 596-6662

No. 89-3353

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

H. VAUGHN TOWNSEND, M.D., et al.

Plaintiffs-Appellees

V.

HENRY G. CRAMBLETT, M.D., et al

On Appeal from the United States District Court for the Southern District of Ohio

Defendants-Appellants,

and

OHIO STATE MEDICAL BOARD,

DEFENDANT.

_____/

Before: MILBURN and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. The named Plaintiffs, as well as the members of the class they represent, obtained undergraduate diplomas

from colleges and universities in the United States and then completed graduate studies in medicine at various foreign medical schools that have come into existence since 1970.[1] After receiving their diplomas, these graduates sought either temporary or permanent licenses to practice medicine in the State of Ohio. Notwithstanding their completion of the medical school curriculum, the plaintiffs uniformly were denied professional licenses by the Ohio State Medical Board (Board). This litigation followed.

The Board's failure to grant licenses to the plaintiffs apparently resulted from the Board's refusal to recognize the credentials of students who attended foreign medical schools not listed in the World Health Organization's 1970 Directory of Medical Schools. According to Board policy as of

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[1] Two foreign medical schools, St. George's University School of Medicine and Ross University, have intervened as Plaintiffs.

1984, a foreign medical school not included in the 1970 directory had to be satisfactorily evaluated by the Board before the school's graduates were permitted to obtain Ohio licensed.[2] The plaintiffs contented that the Board's exclusive reliance on the 1970 directory to the detriment of new foreign medical schools and their graduates constituted an impermissible and improperly adopted rule under Ohio law. Moreover, the plaintiffs assert that the Board's application of its unlawful policy has deprived the graduates of new foreign medical schools of their liberty interest in practicing medicine in Ohio without due process. The ten individual members of the Board named as defendants in this suit filed a motion for summary judgment

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[2] This policy, previously set forth in OHIO ADMIN. Code 4731-3-16, was temporarily repealed effective June 6, 1988, and then permanently repealed effective February 10, 1989.

interposing,among a broad range of arguments, the defense of qualified immunity.[3] Specifically, the individual defendants contended that the plaintiffs' liberty interest in practicing medicine was not clearly established when the plaintiffs filed suit in 1984. (App. at 181). In addition, the defendants asserted that their approach to analyzing the graduates of foreign medical schools was not clearly impermissible under any state or federal law as of 1984. (App. at 181).

The district court, however, concluded

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[3] The plaintiffs critically note the defendants' failure to plead qualified immunity as an affirmative defense. Failure to promptly plead qualified immunity is not necessary to bar to assertion of the defense. See Kennedy v. City of Cleveland, 797 F.2d 297. 300 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Indeed, the Seventh Circuit recently commented that qualified immunity may be raised as a defense by pleading or motion "at any stage in the litigation." Alvarado v. Picur, 859 F2d 448, 451 n.3 (7th Cir. 1988) (collecting cases). the defendants in this case presented the qualified immunity issue twice by motion well before trial was even contemplated. Under circumstances, the district court did not act improperly in addressing the merits of the qualified immunity argument.

that the board members knew or should have known that the Board's policy violated both Ohio's procedural law governing promulgation of rules and the state's substantive law prescribing the conditions and methods for licensing foreign medical school graduates. The court reasoned that the board members knew in 1979 that improper adoption of rules would be ineffectual, and that Board review of individual foreign medical schools was not authorized by Ohio law. Accordingly, the court denied the board members' motion for summary judgment insofar as the plaintiffs' liberty interest in practicing medicine is concerned.[4] The defendants promptly appealed the denial of qualified

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[4] The district court's opinion addressed myriad issues in addition to the qualified immunity question. In their briefs on appeal, the parties have attacked various aspects of the district court's ruling that have little or nothing to do with qualified immunity. We cannot undertake appellate review of such matters at this juncture, se, e.g., Estrada-Adorno v. Gonsales, 861 F.2d 304,307 (1st Cir. 1988), so we need not even enumerate, much less resolve.

immunity.[5] Because we find that the district court improperly rejected the individual defendants' qualified immunity argument, we reverse.

I

The doctrine of qualified or good faith immunity insulates public officials "performing discretionary functions" from individual liability "for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). According to the Supreme Court, "[t]he contours of the right" alleged to have been violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640

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[5] Immediate appeal of the qualified immunity issue is authorized by Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985). No other aspect of the case is presently before us.

(1987). Moreover, as we have explained, "[t]he relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions." Poe v. Haydon, 853 F.2d 418, 423-24 (6th Cir. 1988) (emphasis added), cert. denied, 109 S. Ct. 788 (1989). Thus, the individual board members in this case are entitled to qualified immunity unless the plaintiffs' "rights were so clearly established when the acts were committed that any [board member] in the defendant[s'] position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987).

"The question of whether qualified immunity attaches to an official's actions is a purely legal question[,]" Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988),

so we review the district court's denial of qualified immunity de novo. See, e.g., Tribble v. Gardner, 860 F.2d 321,323 (9th Cir. 1988), cert. denied, 109 S. Ct. 2087 (1989). Our task is to ascertain whether the individual board members engaged in any conduct violative of the plaintiffs' rights as established prior to May 1, 1984. Because the district court derived the plaintiffs' fourteenth amendment liberty interest in the practice of medicine in Ohio purely from the state's statutory licensing scheme, [6] (App. at 290-92), we must

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[6] A liberty interest may be based on either the Constitution or a state law or regulation. See, e.g., Beard v. Livesay, 798 F.2d 874, 876 (6th Cir. 1986). The fifth Circuit's decision in Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553 (5th Cir. 1988), implicitly acknowledges that, under certain circumstances, an individual can obtain a liberty interest in the practice of a profession based upon state law. See id. at 557-58. The plaintiffs' due process claim in this case ostensibly is limited to such a theory.

analyze the settled law of Ohio as of 1984.

II

Under Ohio law, Board is vested with "the power of examining applicants to determine their fitness to practice medicine." Hyde v. State Medical Bd., 33 Ohio App. 3d 309, 311, 515 N.E.2d 1015, 1017 (1986). This broad power is circumscribed by a statutory framework designed to guide the Board in the exercise of its discretion. For example, a United States citizen who holds an undergraduate degree from an approved school and "who has studied medicine at a medical school located outside the United States which is listed by the World Health Organization ... shall be admitted to the [permanent licensure] examination" upon completion of several enumerated requirements. Ohio Rev. Code Ann. 4731.09(B) (Anderson 1987) (emphasis added). Likewise, temporary licensure is available to any qualifying graduate of "a medical or osteopathic school or college

which, in the judgment of the [B]oard, is reputable or in good standing[.]" Id. 4731.291.

Pursuant to what it viewed as its statutory directive in the early 1980s, the Board applied a stringent licensing policy to candidates who received their degrees from foreign medical schools. Specifically, the Board only recognized credentials from foreign schools listed in the 1970 World Health Organization directory; the Board declined to recognize listings in subsequent World Health Organization directories because the standards for inclusion in more recent directories were significantly relaxed. See Hyde, 33 Ohio App.3d at 311, 515 N.E.2d at 1017-18. Although the Board did provide for certification upon individualized consideration of schools not listed in the 1970 directory, the Board's policy unquestionably foreclosed graduates of foreign schools listed solely in more

recent directories from automatic credential recognition.

In 1986, more than two years after the plaintiffs filed this suit, the Ohio Court of Appeals determined that the Board lacked the rulemaking authority to adopt its policy concerning graduates of foreign medical schools,[7], see Hyde, 33 Ohio App. 3d at 313, 515 N.E.2d at 1019, and held that the Board's policy "changed the meaning of the [permanent licensing] statute[.]" See id. In dissent, Judge McCormac opined that "[w]hat it means to be listed by the World Health Organization is ambiguous, particularly in light of the history of

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[7] The Board did obtain the requisite rulemaking power on August 27, 1982, see 139 Ohio laws 2401, 2407 (1981-1982) (Amended Substitute House Bill No.317 codified at Ohio Rev. Code Ann. 4731.05), but the Board's policy of recognizing only foreign medical schools listed in the 1970 directory predated the acquisition of rulemaking authority.

listing by that organization." Id. at 315, 515 N.E.2d at 1020 (McCormac, J., dissenting). Thus Judge McCormac reasoned the the Board was well within its authority "to give substance to the requirement of listing[.]" Id. at 315, 515 N.E.2d 1020-21. When the Ohio Court of Appeals extended the logic of Hyde to temporary licensing decisions in 1988, the Ohio Supreme Court decided to review the appellate court's ruling. See Anderson v. State Medical Bd., No. 87AP-625 (Ohio App. July 28, 1988) (Unpublished), leave granted, 40 Ohio St.3d 706, 534 N.E.2d 847 (1988).

After canvassing the development of Ohio law, the district court determined that Ohio's statutory licensing scheme pertaining to graduates of foreign medical schools, as construed by Hyde, clearly established "as early as 1979" that the Board lacked the authority to either promulgate rules or limit the concept of listing to the 1970 directory. Based on its procedural and

substantive concerns about the Board's policy regarding the listing of foreign medical schools, the district court found the defense of qualified immunity inapplicable.

III

The district court's concern with the Board's procedural authority to promulgate its policy as a formal rule is, in our view, misplaced. While the Board may not have had the authority under Ohio law to promulgate its policy on listing of foreign medical schools as a formal rule, see Hyde, 33 Ohio App. 3d at 313, 515 N.E.2d at 1019, the Board historically has possessed extensive power to examine medical schools, see State ex rel. Hygea Medical College v. Coleman, 64 Ohio St. 377, 388, 60 N.E. 568, 572 (1901), and to evaluate their graduates' "fitness to practice medicine." Hyde, 33 Ohio App. 3d at 311, 515 N.E.2d at 1017. For this reason, the Board most assuredly could have devised informal standards for

considering medical schools and license applicants without formally promulgating such policies as rules. The Board thus would have run afoul of state law only by implementing substantively (as opposed to procedurally) flawed policies. Consequently, procedural defects in Board rules, though perhaps violative of state law, do not perforce give rise to a constitutionally protected liberty interest in this context.[8] Cf. Harris v. Birmingham Bd. of Educ., 817 F.2d 1525, 1528 (11th Cir. 1987) ("[T]he violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal constitution.").

According to the Supreme Court, "a state creates a protected liberty interest by

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[8] The sucess of several individual plaintiffs in state evinces the willingness of the Ohio courts to cure any harm that has resulted from the Board's procedural misstep. See e.g., Hickey v. State Medical Bd., No. 88AP-769 (Apr. 27, 1989) (unpublished); Anderson, No. 87AP-625; Hyde, 33 Ohio App. 3d 309, 515 N.E.2d 1015.

placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis added); accord Beard v. Livesay, 798 F.2d 874, 876 (6th Cir. 1986). Conversely, a state statute that merely prescribes procedure, yet "place[s] no substantive limitations on official discretion . . . create[s] no liberty interest entitled to protection under the Due Process Clause." Olim, 461 U.S. at 249. The Ohio statutory scheme governing rulemaking, which the Board apparently disregarded in devising its interpretive policy concerning the statutory listing requirement, see Hyde, 33 Ohio App. 3d at 313, 515 N.E.2d at 1019, places no substantive limitations on the Board's power to assess the credentials of license applicants and ultimately grant or deny licenses based on its assessment. See Ohio Rev. Code Ann. 119.01, et seq. As such, the Ohio statutory rulemaking scheme cannot form the basis of the plaintiffs' alleged

liberty interest in licensure to practice medicine. See Olim at 250-51. If the plaintiffs have any claim for deprivation of a cognizable liberty interest, that claim must arise from a substantive defect in the policy applied by the defendant board members.

The focal point of our qualified immunity inquiry must be substantive, statutory licensing criteria as interpreted by the Ohio courts, which form the basis of the plaintiffs' purported liberty interest. The pertinent provision in this respect mandates admission to all graduates of any "medical school located outside the United States which is listed by the world health organization[.]" See Ohio Rev. Code Ann 4731.09(B). Ohio's statutory licensing scheme, however, fails to define precisely what the listing requirement contemplates. The board members collectively chose to define the term by reference to the 1970 directory, which was the World Health

Organization's latest pronouncement when the Ohio legislature adopted the listing standard. The Board's interpretation remained the operative standard until 1986 when a divided Ohio Court of Appeals panel eschewed the Board's construction of the listing provision. See Hyde, 33 Ohio App. 3d 309, 515 N.E.2d 1015 (1986). Nevertheless, the plaintiffs characterize the statutory listing requirement as clearly established prior to 1984.

In Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988), we explained that "a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court" in order to be "clearly established" for purposes of qualified immunity. Id. at 351. The impropriety of limiting automatically qualifying foreign medical schools to those listed in the 1970 World Health Organization directory has never been established by the Ohio Supreme

Court. Only the Ohio Court of Appeals has reached such a conclusion, see Hyde, 33 Ohio App. 3d 309, 515 N.E.2d 1015; Anderson, No. 87AP-625, and its ruling in Anderson currently is before the Ohio Supreme Court. In short, we cannot find authority to support the district court's conclusion the "impropriety" of the Board's policy regarding foreign medical schools has ever been clearly established. This determination is bolstered by the Hyde dissent, which aptly notes that the meaning of a listing by the World Health Organization is, itself, unclear. See Hyde, 33 Ohio App. 3d at 315, 515 N.E.2d at 1020 (McCormac, J., dissenting). Simply put, the individual board members could not have known prior to the 1986 Hyde decision that their interpretation of the phrase "listed by the world health organization' was improper. Indeed, both the Franklin County Court of Common Pleas that initially decided Hyde and Judge McCormac writing in dissent

on appeal endorsed the Board's interpretation of the statutory language. Because no Ohio court provided a contrary reading of the pertinent statutory language until 1986, more than two years after the plaintiffs filed this suit, and because the Ohio Supreme Court still has not rejected the Board's interpretation, the Defendants are entitled to qualified immunity from monetary damages in this case.[9]

REVERSED.

ISSUED AS MANDATE: February 14, 1990
COSTS: NONE

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[9] Based on our disposition of the individual defendants' qualified immunity argument, we need not reach the question of whether the board members are entitled to absolute immunity under Horwitz v. State Bd. of Medical Examiners of Colorado, 822 F.2d 1508 (10th Cir.), cert. denied, 484 U.S. 964 (1987). We note, however, that the defendants' effort to raise this issue on appeal appears inappropriate. The district court rejected the absolute immunity argument in an August 19, 1987, memorandum and order, yet the individual defendants did not file their notice of appeal until April 17, 1989. Moreover, the notice of appeal expressly states that the individual defendants "hereby appeal...from the order entered March 17, 1989, denying their claim of qualified immunity." (App. at 299)

No. 89-3353

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

H.VAUGHN TOWNSEND, M.D., et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
V.	:	
	:	
OHIO STATE MEDICAL BOARD,	:	
	:	ORDER
Defendants,	:	
	:	
HENRY G. CRAMBLETT, M.D., et al,	:	
	:	
Defendants-Appellants	:	

BEFORE: MILBURN, and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition has been referred to the original hearing panel.

The panel has further reviewed the

petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

H. VAUGHN TOWNSEND, M.D., et al	:	
	:	
Plaintiffs,	:	
	:	
V.	:	Case No.
	:	C2-84-867
OHIO STATE MEDICAL BOARD, et al	:	
	:	
Defendants.		

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs allege Federal and Ohio civil rights violations. Jurisdiction is based upon federal civil rights statutes and the principals of pendent jurisdiction.

ALLEGATIONS AND FACTS

The individual plaintiffs are doctors who are graduates of foreign medical schools located in countries in the area of the

Caribbean Sea and the Gulf of Mexico. The plaintiffs allege that they have been wrongfully denied the opportunity to obtain a license to practice medicine in the State of Ohio by the defendants, the Ohio State Medical Board and its individual members. The core of plaintiff's claims is the Board's use of the 1970 or earlier editions of the World Health Organization Directory of Medical Schools in evaluating the recognizing the qualifications of an applicant for licensure. Plaintiffs attended medical schools which have come into existence since the 1970 edition was published. The defendants allegedly refuse to accept the credentials of graduates of a post-1970 medical school unless the Board has conducted an evaluation of the school's academic program and has found that the school satisfactorily meets the accreditation requirements established by the Liaison Committee for Medical Education. St. George's University School of Medicine

and Ross University, added as party plaintiffs, are medical schools whose diplomas the Board has thus far refused to recognize. Plaintiffs contend that the Board's exclusive use of the 1970 WHO directory is contrary to Ohio law, specifically, Section 4731.09(B), Ohio Revised Code.

STANDARD OR REVIEW

In considering this motion, the Court is mindful that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(A)], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusions as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) citing Brady v. Southern Ry, Co., 320 U.S. 476, 479-480 (1943). Thus, the Supreme Court concluded in Anderson that a judge considering a motion for summary judgment must "ask himself not

whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. 477 U.S. at 252.

Such an inquiry necessarily implicates

the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e) therefore requires that the nonmoving party to go beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotec Corp. v. Catrett, 477 U.S. 317, 324 (1986) (Emphasis added). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id., at 322. Thus, the mere existence of a scintilla of evidence in support of a plaintiff's claim is insufficient there must be evidence upon

which a jury could reasonably find for the plaintiff. Having discussed the Rule 56 standard of review, the Curt now turns to the merits.

LAW AND ANALYSIS

42 U.S.C. 1983

The defendants contend that St. George's University School of Medicine and Ross University cannot maintain an action under 1983 because they are not "persons within the jurisdiction of the United States." In their complaint, Ross University claims to be "an educational institution charged by the Government of Dominica, West Indies. . . and maintains an office in New York City." Additionally, both schools conduct clinical training in facilities located in the United States.

Section 1983 protects "any citizen of the United States or other person within the jurisdiction thereof." thus, Section 1983 is available even to non-citizens. See Graham

v. Richardson, 403 U.S. 365 (1971). In this case, it is clear that the plaintiff schools are non-citizens and as such may sue under Section 1983. Nonetheless, the Court must determine whether the schools are within the jurisdiction of the United States. By maintaining offices in the United States and conducting clinical programs therein, the schools have subjected themselves to the jurisdiction thereof. Consequently, the schools are "persons within the jurisdiction" for purposes of Section 1983.

The defendants also argue the plaintiffs' complaint fails to state a claim under Section 1983. By the plain terms of section 1983, two--and only two--allegations are required in order to state a cause action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640

(1980). In this case there is no doubt that the defendants were acting under color of state law when they denied licensure to the plaintiff doctors and limited their recognition of schools to those which were listed in the 1970 WHO directory. Thus, the Court's inquiry is limited to whether the plaintiffs properly alleged that they were deprived of a federally protected right.

DUE PROCESS

The fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. With this constitutional directive in mind, the Court will examine the plaintiffs' alleged property and liberty interests in practicing medicine in the State of Ohio.

Property Interest

It is well established that property interests are not created by the

Constitution, rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, whether or not the plaintiffs have a property interest in the practice of medicine is determined in reference to Ohio Law.

O.R.C. Section 4731.14 requires the state medical board to issue its certificate if the applicant 1) pays the required fee and 2) passes the examination. An applicant will not be admitted to the examination unless he holds the credentials set forth in section 4731.09 of the Revised Code. Under O.R.C. Section 4731.09(B) a United States citizen who has completed his undergraduate studies at a college or university in the United States approved for preliminary training by the state medical board and who has studied medicine at a medical school located outside the United States which is

listed by the world health organization but who is not authorized to practice all branches of medicine or surgery in the foreign country in which he studied shall be admitted to the examination upon completion of each of the following requirements:

1).....

2).....

3).....

In light of the applicable law, it is pristinely clear that a constitutionally recognized property interest in the practice of medicine does not arise until the applicant fulfills the statutory prerequisites and passes the examination. Here, assuming the plaintiffs have fulfilled statutory prerequisites, they still have not passed the examination. Thus, the plaintiffs do not have a constitutionally recognized property interest in the practice of medicine in the state of Ohio.

Liberty Interest

However, the plaintiffs do have a

constitutionally protected liberty interest. Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself and the laws of the States. Hewitt v. Helms, 459 U.S. 460, 466 (1983); Meachum v. Fano, 427 U.S. 215, 223-227 (1976). A state creates a protected liberty interest by placing substantive limitations on official discretion. If the decisionmaker is required to base its decisions on objective and defined criteria and cannot deny the requested relief for any constitutionally permissible reason or for no reason at all, the state has created a constitutionally protected liberty interest. Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

In this case, the plaintiffs studied medicine at medical schools located outside of the United States and arguably fulfilled all statutory requirements for admittance to the examination. However, according to the defendants, the medical schools were not listed by the world health organization

since they did not appear in the 1970 edition of the World Health Organization Directory. The Court notes that the operative statute makes no mention of the 1970 Edition rather the statute requires that the school be "listed by the world health organization." Nevertheless, under Ohio law, the medical board may adopt rules to effectuate statutory directives pursuant to O.R.C. Section 119 et seg.

However, the Court of Appeals for Franklin County, Ohio, determined in Hyde v. State Medical Board, 33 Ohio App.3d 309, 313 (1986), that:

> The board's policy requiring a medical school to be listed in the 1970 World Health Organization Directory was in fact never properly adopted pursuant to R.C. 119.02. The board had no authority to promulgate any rules relating to R.C. 4731.09.

Thus, the boards' policy was not in accordance with Ohio law and in fact was a usurpation of any power given to it by the legislature. It is clear that the Ohio Court of Appeals recognized that the above described statutes place substantive

limitations on the discretion of the board. As such, the plaintiffs had a constitutionally protected liberty interest in the substantive limitations placed on the board's discretion. The Hyde decision makes it clear that the board did not act within its substantive limitations when it created the policy requiring a medical school to be listed in the 1970 World Health Organization Directory. Thus, the plaintiffs have properly alleged that they were deprived of a federally protected right. Consequently, summary judgment is not appropriate on these grounds.

Equal Protection

The Plaintiffs also argue that the Board's policy denies them equal protection. It is undeniable that the Board's policy discriminated between certain classes of applicants based upon whether or not they graduated from medical schools listed in the 1970 WHO directory. Nevertheless, it is only when discriminatory treatment is not

related to a legitimate legislative end or when it is based on a suspect classification that it may violate the Equal Protection Clause of the Fourteenth Amendment. New Orleans v. Duke, 427 U.S. 297 (1976).

In this case, it is clear that the Board's policy has some conceivable relationship to a legitimate legislative end. A state may closely regulate the practice of medicine and to that end may enact laws which accord different Code to carry out the purposes of Chapter 4731. The Court believes that Section 4731.05 provides a sufficiently clear directive to the medical board. Thus, O.R.C. Section 4731.05 put the board on notice that its resolutions/rules must be promulgated in accordance with Ohio law. Consequently, it is apparent that the board's resolutions / rules have no force or effect unless they are adopted pursuant to Chapter 119.

Furthermore, the board's "minutes" pages 939 and 940 indicated that the board was aware, in December 1979, of the fact that

they needed validly promulgated rules in order to effectuate 1970 WHO directory freeze. Additionally, the board was aware in March 1981 (board minutes, page 1527) that the Joint Committee on Agency Rule Review (JCAR) rejected rules which would allow the board to evaluate foreign medical schools. The Board advised that:

> The legislature felt that these rules were beyond the intent and authority contained in the present statutes.... Mr. Bamgarner continued that this leaves a major problem with the question of whether that action in the legislature means that the Board can no longer enforce the December 1979 motion and other motions having to do with policies for foreign schools until such time as other rules are put in place or legislation is passed. (Board minutes page 1527).

Finally, in 1986, the Hyde decision made it perfectly clear that O.R.C. Section 4731.05 is not excess verbiage. In Hyde, the court held that the board may not deny an applicant's application to practice medicine in the state of Ohio based upon policies or rules not promulgated in accordance with Chapter 119. In light of the foregoing, it is this Court's treatment to applicants

based upon their academic qualifications. As the Court stated in Graves v. Minnesota, 272 U.S. 425, 428 (1926), the fact that an applicant holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry. Thus, Graves stands for the proposition that state regulation of the medical profession needs only to be retionally related to a legitimate state interest.

In this case, the plaintiffs have failed to show that there was no conceivable rational basis for the Ohio legislature's decision to distinguish between domestic and foreign medical schools. The plaintiffs have also failed to show that distinguishing between domestic and foreign medical schools is invidious discrimination involving a suspect classification. Here, the plaintiffs' equal protection claim rests upon broad conclusory allegations and general references in their memoranda. Without more, summary judgment is appropriate in regard to

the plaintiffs' equal protection claims.

42 U.S.C. Sections 1985 (3) and 1986

The Plaintiffs also argue that the defendants' actions violate Section 1985(3). To establish a Section 1985(3) claim, a complaint must allege four elements: 1) a conspiracy; 2) "for the purpose of depriving, directly or indirectly, any person or class of persons or equal protection of the laws, or of equal privileges and immunities under the laws; 3) that the conspirators committed furtherance of the conspiracy; and 4) that the plaintiff was either "injured in his person or property" or was "deprived of having and exercising any right or privilege of a citizen of the United States." Griffin v. Breckenridge, 403 U.S. 88, 103-104 (1971).

In this case, the plaintiffs have failed to satisfy this Court that there is a genuine issue of fact regarding elements 1 and 2. It is apparent that the Plaintiffs cannot support their claim of conspiracy.

There is a complete absence of proof regarding an agreement between the defendants. The plaintiffs have not shown that the defendants expressly or circumstantially agreed to deprive the plaintiffs of certain rights or to harm then in some way. Consequently, the plaintiffs have failed to offer proof regarding an element upon which they bear the burden of proof at trial.

Assuming arguendo that the plaintiffs have evidence which supports their claim of conspiracy they still have failed to show that the conspiracy is motivated by some racial or perhaps class-based, invidiously discriminatory animus. As the Court noted in the equal protection section infra, this case does not involve a suspect classification. Hence, the plaintiffs' Section 1985(3) claim is without merit and is therefore dismissed.

Additionally, plaintiff's Section 1986 claim must also be dismissed. That is because there can be no claim under Section

1986 unless there is a valid Section 1985 claim. See, Coleman v. Garber, 800 F.2d 188 (CA8 1986)

Qualified Immunity

The defendants also contend that they are entitled to qualified immunity. Plaintiffs argue that summary judgment should not be granted on the issue of qualified immunity because the defendants have resisted plaintiffs' efforts to complete discovery on matters directly relating to the issue of qualified immunity. On this point, the plaintiffs' arguments fall on deaf ears. A review of the file indicates that the plaintiffs have not filed nay motions to compel discovery on this issue. Thus, the Plaintiffs claims have no basis. Additionally, the Supreme Court has clearly stated that discovery is litigation against government officials should be halted until the threshold question of immunity is resolved. See Harlow v.

desire to preclude excessive discovery against the government and resolve "insubstantial" claims on summary judgment also extends to issues that would dispositive of the qualified immunity issue. See Anderson v. Creighton, ____ U.S. _____, 107 S.Ct. 3034, 3042 n.6 (1987). Finally, resolution of qualified immunity issues is purely a question of law for the district court. Dominique v. Telb, 831 F.2d 673, 677 (1987). Consequently, the fact that the plaintiff wishes to depose more witnesses is irrelevant.

It is manifest that government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 U.S. at 818. Thus, whether an official "may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal

reasonableness" of action, assessed in light of the legal rules that were "clearly established" at the time it was taken. Anderson, ____ U.S. ____, 107 S.Ct 3038. The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that reasonable official would understand that what he is doing violated that right. That is not to say that an official action is protected unless the very action in question had previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent. Id at ___, 107 S.Ct. at 3039 (citations omitted).

Under the circumstances of this case, the Court can say that in light of preexisting law that the medical board knew or should have know that their policy violated the law. In December 1979, the board passed a resolution freezing acceptance of foreign medical schools to

those listed in the 1970 WHO directory. However, under Ohio Revised Code Section 4731.05, the medical board is required to adopt rules in accordance with Chapter 119 of the Revised belief that, as early as 1979, it would have been apparent to a reasonable person that the medical board's policies or rules were invalid unless they were promulgated in accordance with Chapter 119. Therefore, the individual defendants are not entitled to qualified immunity. As a result, summary judgment, in favor of the defendants, is not appropriate on the issue of qualified immunity.

Whereupon, upon consideration and being duly advised that Court hereby GRANTS in part and DENIES in part the defendants' motion for summary judgment.

IT IS SO ORDERED.

_____

U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

H. VAUGHN TOWNSEND, M.D., et al	:	
	:	
Plaintiffs,	:	
	:	
V.	:	Case No. C2-84-867
OHIO STATE MEDICAL BOARD, et al	:	
	:	Judge Smith
Defendants.		

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion for class certification.

Plaintiffs allege Federal and Ohio civil rights violations. Jurisdiction is based upon federal civil rights statutes and the principals of pendent jurisdiction.

ALLEGATIONS AND FACTS

The individual plaintiffs are doctors who are graduates of foreign medical schools located in countries in the area of the Caribbean Sea and the Gulf of Mexico. The plaintiffs allege that they have been

wrongfully denied the opportunity to obtain a license to practice medicine in the State of Ohio by the defendants, the Ohio State Medical Board and its individual members. The core of plaintiff's claims is the Board;s use of the 1970 or earlier editions of the World Health Organization Directory of Medical Schools in evaluating the recognizing the qualifications of an applicant for licensure. Plaintiffs attended medical schools which have come into existence since the 1970 edition was published. The defendants allegedly refuse to accept the credentials of graduates of a post-1970 medical school unless the Board has conducted an evaluation of the school's academic program and has found that the school satisfactorily meets the accreditation requirements established by the Liaison Committee for Medical Education. St. George's University School of Medicine and Ross University, added as party plaintiffs, are medical schools whose

diplomas the Board has thus far refused to recognize. Plaintiffs contend that the Board's exclusive use of the 1970 WHO directory is contrary to Ohio law, specifically, Section 4731.09(B), Ohio Revised Code.

STANDARD OR REVIEW

The legal standard for class certification is set forth in Rule 23 of the Federal Rules of Civil Procedure. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Rule 23(a) requires the Court to find the following prerequisites for class certification: 1) that the class is so numerous that joinder of all members if impracticable, 2) that there are questions of law or fact common to the class, 3) that the claims or defenses of the parties are

typical of the claims or defenses of the class, and 4) that the representative parties will fairly and adequately protect the interests of the class.

LAW AND ANALYSIS

23(a) (1) Numerosity

Plaintiffs must first establish that the proposed plaintiff class is so numerous that joinder is impracticable. In order to satisfy this requirement, plaintiffs need not allege the exact number and identity of class members, but must only establish that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members. Zeidman v. J. Ray McDermott & Co., 651 F/2d 1030, 1038 (CA5 1981). The plaintiffs; complaint alleges that a reasonable estimate of the total number of class members is approximately 150 to 200 persons. The Court considers that number of putative class members sufficient to establish the numerosity requirement. If the Court

determines that the plaintiff class should include subclasses, they may not be required to satisfy independently the numerosity factor. See 1H. Newberg, Newberg on Class Actions Section 3.09 (2d ed. 1985).

23(a) (2) Commonality

The Commonality requirement is met when the plaintiff establishes that the case contain questions of law or fact common to the class, it does not mandate that all questions of law or fact be common. Here the central issues are focused upon the legality of the board's policy of denying permission to sit for the examination to those individuals who graduated from medical schools not listed in the 1970 WHO directory. The plaintiff allege that all class members were denied an opportunity for licensure due to the board's alleged illegal policies. Thus, it appears that the challenged policies were applied to the class as a whole. Therefore, the legality of the policies is clearly a common question of

law. This common legal issue also encompasses common issues of fact such as the intent of the policies. Consequently, the commonality requirement is satisfied.

23(a) (3) Typicality

The typicality requirement is met if the claims of the named plaintiffs have the same essential characteristic as the class at large. Sheftelman v. Jones, 667 F.Supp 859, 863 (N.D. Ga. 1987). However, "[f]actual identity between the plaintiff's claims and those of the class he seeks to represent is not necessary." Senter v. General Motors Corp., 532 F.2d 511, 524 (CA6 1976). In this case, the factual basis for the named plaintiffs; claims arise from the same governmental action. Thus, it appears that the plaintiffs; claims have the same essential characteristics as the class at large. As a result, the typicality requirement is met.

23(a) (4) Adequacy of Representation

The plaintiffs; seek certification under Fed.R.Civ.P 23(B) (2) which requires that:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Here, the plaintiffs' claim all arise from a common course of conduct; the medical board allegedly refused licensure to those persons who graduated from medical schools not listed in the 1970 WHO directory. If the board's policy in this regard is contrary to law then injunctive and/or declaratory relief may be appropriates. Thus, plaintiff;s class is hereby CONDITIONALLY CERTIFIED.

The class shall consist of those persons who have graduated from schools, colleges or universities teaching medicine which are located in nations, dependencies or commonwealths situated in, or bordering upon the Caribbean Sea Basin and/or Gulf of Mexico; and, who are unable to obtain

temporary or permanent licensure from the State Medical Board, State of Ohio, or who have been denied permission to take the Federated Licensing Examination on the grounds that the school, college, or university which granted their respective M.D. degrees were not approved by the board on the grounds that the schools, colleges or universities were not listed in the 1970 World Health Organization Directory.

Magistrate Kemp is hereby directed to make further orders, as necessary, regarding subclasses and the like on or after April 30, 1989.

Whereupon, upon consideration and being duly advises the Court hereby GRANTS plaintiffs; motion for class certification.

IT IS SO ORDERED.

_____

U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

H. VAUGHN TOWNSEND, M.D., et al	:	
Plaintiffs,	:	
V.	:	Case No. C2-84-867
OHIO STATE MEDICAL BOARD, et al	:	
Defendants.	:	

JUDGMENT IN A CIVIL CASE

____ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's Rule 56 motion for summary judgment is GRANTED, and this matter is

DISMISSED.

Dated: April 10, 1990

Clerk - Kenneth J. Murphy

Deputy Clerk - P.D. Anderson

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

H. VAUGHN TOWNSEND, M.D., et al	:	
	:	
Plaintiffs,	:	
	:	
V.	:	Case No. C2-84-867
OHIO STATE MEDICAL BOARD, et al	:	
	:	Judge Smith
Defendants.		

OPINION AND ORDER

This matter is before this Court pursuant to Defendant's Second Motion for Summary Judgment. Subsequently, attachments to the motion were filed, coupled with corrections to the motion's factual statements and a supplemental memorandum in support of the motion. Likewise, plaintiffs have filed before this Court a motion requesting summary judgment. Each party has filed a Memorandum Contra to the opposing party's motion for summary judgment.

FACTS

The Plaintiffs before this Court are two

Medical schools and several doctors who are graduates of either the plaintiff medical schools or other foreign medical schools located in countries in the area of the Caribbean Sea and the Gulf of Mexico. Essentially, the plaintiffs allege that they have been wrongfully denied the opportunity to obtain a license to practice medicine in the State of Ohio by the defendants, the Ohio State Medical Board and its individual members. Plaintiff's claim stems from the procedures used by the Board in its denial of permanent or temporary licensure. The plaintiffs claim that the Board's use of the 1970 or earlier editions of the World Health Organization Directory of Medical Schools in evaluating and recognizing the qualifications of an applicant were a violation of the applicant's liberty interest and contrary to Ohio law, specifically, Section 4731.09(B), Ohio Revised Code. The defendants allegedly refuse to accept the credentials of graduates of a post-1970 medical school

unless the Board has conducted an evaluation of the school's academic program and has found that the school satisfactorily meets the accreditation requirements established by the Liaison Committee for Medical Education.

Since this Court's Order of March 17, 1989, wherein all of the Defendants were granted summary judgement as to several of the claims and the defendants that were being sued in their individual capacity were denied summary judgment based upon qualified immunity, the defendant's have appealed the qualified immunity ruling to the Sixth Circuit Court of Appeals. The Court of Appeals decided their opinion on December 21, 1989. This Court's opinion within this matter is decided with the guidance and in light of the Court of Appeal's recent decision.

STANDARD OF REVIEW

In considering this motion, the Court is mindful that the standard for summary

judgment "mirrors the standard for a directed verdict under [Rule 50 (a)], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), citing: Brady v. Southern Rv. Co., 320 U.S. 476, 479-480 (1943). Thus, the Supreme Court concluded in Anderson that a judge considering a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. 477 U.S. at 252.

Such an inquiry necessarily implicates the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e) therefore requires that the nonmoving party go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (Emphasis Added). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who failed to make a showing sufficient to establish an element essential to that party's case, and

on which that party will bear the burden of proof at trial. Id. at 322. Thus, the mere existence of a scintilla of evidence in support of plaintiff's claim is insufficient-- there must be evidence upon which a jury could reasonably find for the plaintiff. Having discussed the Rule 56 standard of review the Court now turns to the merits.

ANALYSIS

The Sixth Circuit Court of Appeals decision of December 21, 1989, provided in relevant part as follows:

> we cannot find authority to support the district court's conclusion the "impropriety" of the Board's policy regarding foreign medical schools has ever been clearly established. This determination is bolstered by the Hyde dissent, which aptly notes that the meaning of a listing by the World Health Organization is, itself, unclear. See Hyde, 33 Ohio App. 3d at 315, 515 N.E.2d at 1020 (McCormac, J., dissenting). Simply put, the individual board members could not have known prior to the 1986 Hyde decision that their interpretation of the phrase "listed by the world health organization' was improper. [Thus,] ... the defendants are entitled to qualified from monetary damages in this case.

In light of this opinion it is clear that the individual defendants are protected from personal liability by qualified immunity. In properly providing the individual defendants qualified immunity it is likewise proper to grant summary judgment as to those defendants, and as such, the Motion for Summary Judgment as to the individual Board members is GRANTED. Therefore, the only remaining defendant is the Ohio State Medical Board, as an entity.

The Court is mindful that its purview of remedial action is limited to prospective injunctive relief. As such, it would appear from the various state courts' recent rulings that adequate remedies of law are being provided by those courts. See, e.g. Hickey v. State Medical Bd., No. 88AP-769 (Apr. 27, 1989) (unpublished); Anderson v. State Medical Bd., No. 87AP-625 (Ohio App. July 28, 1988) (unpublished), leave granted, 40 Ohio St. 3d 706, 534 N.E.2d 847 (1988); Hyde v. State Medical Bd., 33 Ohio App.3d 309, 515 N.E.2d 1015 (1986).

In Parratt v. Taylor, 451 U.S. 527, the Supreme Court held that no due process violation occurs when the state provides an adequate post-deprivation remedy for a loss of property caused by the negligence of state officials. The United States Supreme Court expanded the holding in Parratt with their decision in Hudson v. Palmer 468 U.S. 517 (1984) In Hudson, the court held that they could "discern no logical distinction between negligent and intentional deprivations of property", and therefore, "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation [state] remedy for the loss is available." 468 U.S., at 533. However, the "Courts of Appeal are divided on whether the Supreme Court will extend the Parratt requirement of showing of inadequate state remedies to cases involving the deprivation of liberty interests . .." Vicory v. Walton,

721 F.2d 1062, 1065 (6th Cir. 1983). Nonetheless, the Sixth Circuit Court of Appeals stated in Peterson Enterprises, Inc. v. Ohio Dept. of Mental Retardation and Development Disabilities, et al, 890 F.2d 416, 1989 U.S. App. LEXIS 17818 as follows:

> In order to make out procedural due process claim, plaintiff must establish three factors. First, plaintiff must establish the deprivation of that property or liberty interest. Second, plaintiff must establish the deprivation of that property or liberty interest. Finally, Plaintiff must show that the state remedies for redressing the alleged deprivation are inadequate because they fail to provide procedural due process of law. See Hudson v. Palmer 468 U.S. 517 (1984); Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied, 469 U.S. 834 (1984). (emphasis added).

In the instant case it is clear that the state provides the plaintiffs with the right to notice and a hearing before they can be denied a medical license. furthermore, the plaintiffs are provided judicial review at the Common Please Court level and the right to appellate review of the Common Pleas Court's decision. These avenues of redress were available when this action was originally instituted as exemplified by the

fact that several of the plaintiffs in this action have matters pending before various state courts.

Therefore this Court is of the opinion that adequate remedies exist in the state courts, particularly in light of the limitations on this Court's available remedies. See e.g., Parratt, 451 U.S. 527 (1981)' Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (Circuit Court applied Parratt analysis to liberty interests); and 1946 St. Clair Corp. v. Cleveland, 49 Ohio St. 3d 33, (1990) (Ohio Supreme Court held that for a valid claim under Section 1983, Title 42, U.S. Code and the Fourteenth Amendment for deprivation without due process of a purely economic interest, a plaintiff must allege and prove the inadequacy of state remedies). furthermore the Court finds that the plaintiffs have failed to prove or even realistically allege that the state remedies are inadequate. As such, plaintiffs clearly fail the three part test enumerated by the Appellate Court in Peterson Enterprise.

For the reasons enumerated above, it is clear that the state court is capable of providing adequate remedies to the plaintiffs and that the plaintiffs have failed to allege and/or prove any inadequacies in the state remedies. Therefore, defendant's Rule 56 Motion for Summary Judgment is GRANTED, and this matter is DISMISSED.

IT IS SO ORDERED

_____

U.S. District Judge

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David Estlow Hyde, M.D.,	:	
	:	
Appellant-Appellant	:	
	:	
V.	:	No. 86AP-475
	:	(regular
The State Medical Board,	:	Calendar)
	:	
Appellee-Appellee	:	

OPINION

Rendered on December 30, 1986

MESSRS. TAFT, STETTINIUS & HOLLISTER, MR. THOMAS C. HILL and MR. A. BRIAN DENGLER, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, and MS. MARY JOSEPH MAXWELL, for appellee.

Appeal from the Franklin County Court of Common Pleas.

REILLY, J.

This is an appeal from a judgment of the Franklin County Court of Common Pleas affirming the Ohio State Medical Board's (hereinafter "Board") decision to deny him a

license to practice medicine in Ohio.

Appellant, Dr. David Estlow Hyde, a native Ohioan who was unable to matriculate into a medical school in the United States, completed two semesters of medical training at the Universidad Autonoma de Guadalajara in Mexico, a Board approved school. He then transferred to another Board approved medical school, Universidad Central del Este in the Dominican Republic, where he completed five semesters. Subsequently, he attended the Universidad Nordestana for three semesters and received his diploma. While attending Nordestana, he was enrolled in an externship program where he completed clinical rotations in hospitals in Springfield, Ohio for academic credit. Nordestana allowed him to complete his externship program in the United States and return to Nordestana at the semester's end for his examination. Although the two prior schools were approved by the Board, Nordestana was not.

After receiving his medical degree,

appellant passed the examination given by the Educational Commission of Foreign Medical Graduates ("E.C.F.M.G.") and the "FLEX" exam (Federation Licensing Examination), given by the Federation of State Medical Boards. He also completed two years of residence at Good Samaritan Hospital in Dayton, Ohio, under the direction of the Department of Family Practice at Wright State University Medical School and approved by the liaison committee on medical education (L.C.M.E.).

Appellant submitted applications to the Ohio State Medical Board for temporary and permanent licenses to practice medicine in Ohio. After the statutory notice informing him that the Board proposed to deny both applications, a hearing was held. Thereafter, the hearing officer filed her report and recommendation advising the Board to deny appellant a license. The Board adopted this report and recommendation.

Dr. Hyde filed a timely notice of appeal with the Franklin County Court of Common

Pleas. The court issued a decision stating that although the Board's "Fifth Pathway" requirement is not in accordance with law, Dr. Hyde could not rely on his externship in Springfield, Ohio to meet the statutory clinical training requirement of R.C. 4731.09(B)(3) since it was used for the purpose of fulfilling an academic requirement. Dr. Hyde filed a "Motion for Correction of Fact in Court's Decision" since it was the residency at Good Samaritan Hospital in Dayton that he wanted equated with the statutory requirement of clinical training. The Court denied the motion and entered a judgment affirming the order of the Ohio State Medical Board.

Appellant has asserted the following assignments of error:

"1. The Common Please Court erred in failing to order the Board to issue Dr. Hyde a full license to practice medicine.

"2. The Common Please Court erred in

failing to order the Board to issue Dr. Hyde a temporary license to practice medicine.

"3. The Common Please Court erred in affirming the Board's order based on findings of fact not supported by reliable, substantial and probative evidence."

Appellant's first and third assignments of error are interrelated and are considered together. The facts present a conflict between the right of a citizen to follow a profession and the right of the state to protect the health and welfare of its citizens. The state, through its police powers, may interfere with the rights of an individual to practice medicine by placing reasonable restrictions on the profession without violating any state or federal constitutional provisions. State, ex rel. Copeland, v. State Medical Board (1923). 107 Ohio St. 20. It is not relevant that the conditions for the licensing of the practice

of medicine and surgery are rigorous and exacting, al long as they are reasonable. Williams v. Scudder (1921), 102 Ohio St. 305. The General Assembly has vested the medical board with the power of examining applicants to determine their fitness to practice medicine. The power conferred upon the state medical board is administrative and not judicial within the meaning of Section , Article IV, Ohio Constitution. France v. State (1987), 57 Ohio St. 1.

The prerequisites applicable to appellant's situation, a United States citizen graduated from a foreign medical school but not fully licensed in that foreign country, are set forth in R.C. 4731.09(B), as follows:

> "A United States citizen who completed his undergraduate studies at a college or university in the United States approved for preliminary training by the state medical board and who had studied medicine at a medical school located

outside the United States which is listed by the World Health Organization but who is not authorized to practice all branches of medicine or surgery in the foreign country in which he studied medicine shall be admitted to the examination upon the completion of each of the following requirements;

"1). The applicant successfully completed all of the formal requirements of the foreign medical school except internship of social service requirements.

"2). The applicant attained on a qualifying examination acceptable to the state medical board a score satisfactory to a medical school approved by the liaison committee on medical education.

"3). The applicant successfully completed one academic year of supervised clinical training at a hospital affiliated with a medical school approved by the liaison committee

on medical education and, subsequent to that year, one year internship or residency a a hospital in the United States having an internship or residency program approved by the state medical board.

The first issue is whether the Nordestana Medical School is listed by the World Health Organization as required by R.C. 4731.09(B) and Ohio Adm. Code 4731-3-16(A)(5). Appellee argues that the school is not listed since it did not appear in the 1970 edition of the WHO Directory. The 1970 edition includes those schools which were listed by their host countries as "recognized institutions of education that confer a medical degree or diploma." It is the Board's policy to determine if a school is listed in the 1970 edition since the standards in subsequent editions were changed.

In subsequent editions, the member states replied to a questionnaire, merely

confirming the existence of the schools. Since Nordestana is a new school, which opened in 1978, it could not have been listed in the 1970 WHO Directory. However, the Board made a provision for evaluating schools not listed in the 1970 directory. The board sent fifty-page questionnaire, in english, to Nordestana Since Nordestana is a spanish speaking institution, appellant was unable to persuade the administration to complete the questionnaire and return it to the Board.

The board further contends that even if it accepted a listing in a subsequent edition, Nordestana still would not meet the statutory requirement. Nordestana was only mentioned in an explanatory footnote in the 1979 fifth edition while other schools had a detailed description of curriculum. Hence, the Board maintains, the footnote does not constitute a "listing" and does not meet the statutory requirement.

A diploma from a medical institution,

offered by a candidate to practice medicine or surgery as evidence of his qualifications, is required by statute to be one from an institution in "good standing" as defined by the Board. R.C. 4731.09. The statute, however, does not define what constitutes a medical institution in "good standing". The question of whether a diploma presented by one who seeks a certificate to authorize him to practice medicine is from a medical institution in good standing is to be determined in the first instance not by the court, but by the Board. State, ex rel. Attorney General, v. Hygeia Medical College (1899), 60 Ohio St. 122. Nevertheless, the Board cannot abridge the powers granted to it by the legislature.

Appellant argues that the mention of Nordestana in the 1979 fifth edition constitutes a "listing" for the purposes of the statute. Appellant offered into evidence at the hearing a letter from a representative of the World Health Organization. This letter was received

shortly after the Board had held its hearing and made a determination as to appellant's status. The letter stated in pertinent part:

> *** The Universidad Nordestana, San Francisco de Macoris, Dominican Republic has not appeared in the Chronicle, since it was already in the fifth edition of the directory ***"

Appellant also argues that the Board's policy requiring that the school be listed in the 1970 WHO directory is void because it was never properly adopted and the Board acquired rulemaking authority only after the time of applying this rule to appellant's case. Thus, appellant maintains that the rule as applied to appellant is improper, invalid, and has no effect. R.C. 1.58(A)(1); R.C. 119.02.

The scope of review in this case was set forth by this court in Angelkovski v. Buckeye Potato Chips Co. (1983), 11 Ohio App.3d 159, at the second and third paragraphs of the syllabus:

> "2. The role of the court of common pleas upon appeal from the unemployment Compensation Board of Review based upon factual grounds is limited to determining whether the board's decision is supported by evidence in the record. A decision supported by some competent,

credible evidence going to all the essential elements of the dispute will not be reversed as being against the manifest weight of the evidence.

"3. An appellate court, in reviewing a determination of a court of common pleas on manifest weight of the evidence on appeal from the board of review, may reverse only upon a showing that the trial court abused its discretion, In this context, abuse of discretion connotes more than an error of judgment; it implies a decision which is without a reasonable basis, one which is clearly wrong."

The Supreme Court also wrote in Univ. of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108, at 111, as follows:

"In undertaking this hybrid form of review, the Court of Common Please must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the factfinder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive."

The boards policy requiring a medical school to be listed in the 1970 WHO directory was in fact never properly adopted pursuant to R.C. 119.02. The board had no authority to promulgate any rules relating to R.C. 4731.09. This section does not

contain any express language that would give the Board the authority to promulgate rules and regulations as the Board finds necessary to effect the purpose of this section. Compare R.C. 4731.291. Since the regulation changed the meaning of the statute, the Board usurped any power give to it by the legislature The rule was improper and consequently invalid. R.C. 1.58(A) (1). The Board's decision to deny appellant a medical license on this basis was not in accordance with law and not properly promulgated pursuant to R.C. 119.02. Thus, the trial court's decision, affirming the Board's action, constituted an abuse of discretion. See Kinney v. Dept. of Admin. Services (1984), 14 Ohio App.3d 33. The judgment of the trial court was without a reasonable basis. Angelkovski, supra.

The board's regulation, Ohio Admin. Code 4731-3-16(A)(5). specifying the statutory requirement of one academic year of supervised clinical training, is also not in accordance with law. See R.C.

4731.09(B)(3). requires an applicant to complete:

> "*** [O]ne academic year of supervised clinical training at a hospital affiliated with a medical school approved by the liaison committee on medical education and, subsequent to that year, one year of internship or residency at a hospital in the United States having an internship or residency program approved by the state medical board."

The board's regulation clarified that the one year of academic clinical training must be met through the fifth Pathways program and not for the purposes of fulfilling the clinical training requirement of a foreign school. Ohio App. Code 4731-3-16(A)(5). The Fifth Pathway Program was implemented to provide a more closely supervised clinical training program for United States citizens returning to the United States after having completed medical school in a foreign country. It was designed to supplement the medical education of United States citizens desiring to practice in the United States but graduating from Mexican medical schools whose standards were not considered to be as stringent. In any

event, the Board did not properly promulgate this regulation as Ohio law requires that an agency, such as the medical board, adopt general policies unless the agency complies with the procedures in R.C. Chapter 119. The Board offered no testimony to show that it attempted to rectify the situation by ratifying the regulation which they improperly applied in appellant's case.

It is undisputed that appellant completed two years of clinical training as a resident in the Family Practice Program at Good Samaritan Hospital in Dayton, Ohio. Appellant contends that at the hearing the Board stipulated to the fact that this clinical training would meet the statutory requirement of R.C. 4731.09(B). The Board's counsel, however, argues that its former counsel only stipulated that appellant had completed a two year residency and not that the residency program substituted for the one year of academic clinical training as required by the statute. See R.C. 4731.09(B). The stipulation reads as

follows:

> "Mr. Hill: Well, if we can just stipulate that he has successfully completed two years of clinical training as a resident in the Family Practice program at Good Samaritan Hospital in Dayton." (Tr. 57).

The Board subsequently acquired rulemaking authority, but Ohio Admin. Code 4731-3-16(A)(5) was not properly in effect at the time of the Board's ruling which denied appellant his permanent and temporary medical license. Thus, the rule is invalid as it applies to appellant. R.C.I.58. The Board's decision to deny appellant a medical license on this basis was not in accordance with law. Hence, the trial court correctly held that the "Fifth Pathway" requirement was not in accordance with law.

Although the "Fifth Pathway" requirement was not in accordance with law, the purpose of the Fifth Pathway Program was to provide a more closely supervised clinical training program and upgrade the medical education of graduates of foreign medical schools desiring to practice in the United States. Appellant has acted in accordance with this

purpose. His two years of clinical training at Good Samaritan Hospital in Dayton, Ohio, a hospital affiliated with a medical school approved by the liaison committee on medical education, fulfilled the purpose of the Board's requirement of a "Fifth Pathway" training since appellant's successful completion of this residency program would indicate his medical skills were acceptable.

In sum, it was unreasonable for the Board to deny Dr. Hyde a license to practice medicine in Ohio based on regulations that were not properly promulgated and consequently, were invalid and of no effect. Therefore, since the school was listed by the World Health Organization in its 1979 edition, and since he fully complied with R.C. 4731.09(B)(3), the trial court abused its discretion in denying Dr. Hyde a permanent license to practice medicine in Ohio. The medical board's decision was contrary to law and not supported by reliable, substantial, and probative evidence. Based on the foregoing rationale,

appellant's first and third assignments of error are well taken.

Appellant's second assignment of error asserts that the trial court erred by not ordering the Board to issue a temporary license to him. The trial court correctly held that the issue was moot since Dr. Hyde had moved and accepted a residency in Indiana. This court, based on the disposition of appellant's first an third assignments of error, also finds the issue to be moot. Consequently, Dr. Hyde's second assignment of error is not well taken.

For the foregoing reasons, the second assignment of error is overruled. Appellant's first and third assignments of error are sustained, and the judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded

STRAUSBAUGH, J., concurs
MCCORMAC, J. dissents.

McCORMAC, J., dissenting.

Dr. Hyde is a United States citizen who graduated from a foreign school and seeks a license to practice medicine in Ohio. R.C. 4731.09(B) requires that the foreign medical school be listed by the World Health Organization. What it means to be listed by the WHO is ambiguous, particularly in light of the history of listing by that organization. At the time R.C. 4731.09(B) was promulgated, the World Health Organization listed only those schools which their host countries had approved as "recognized institutions of education that confer a medical degree of diploma." The 1970 edition of the WHO directory included only institutions who met that criteria. In subsequent additions of the directory, schools were listed merely because they answered a World Health Organization's questionnaire without regard to recognition by their host countries. Consequently, the State Medical Board required either that the foreign medical school be listed in the 1970

World Health Organization directory or in an earlier addition to give substance to the requirement of "listing", which appears to have been contemplated by the General Assembly is setting forth this requirement in R.C. 4731.09(B). If the foreign medical school was not so listed (as would not be possible in the event of a medical school founded since 1970 as was the Universidad Nordestana), the Board allowed approval of the school if it responded appropriately to a questionnaire designed by the Board to help it determine the adaquacy of the program offered by the school. Universidad Nordestana was sent such a questionnaire but it has failed to respond to it.

Additionally, it is ambiguous and debatable whether Universidad Nordestana has been "listed" in additions of the World Health Directory published after 1970. Nordestana was only mentioned in an explantory footnote in the 1979 fifth edition, while other schools had a detailed description of their curriculum. In these

later editions, such as the 1979 edition, schools were listed because they answered a World Health Organization questionnaire even though it was done without regard to recognition by their host country. The footnote reference may indicate that Universidad Nordestana also failed to answer the questionnaire of the World Health Organization, thus not providing it information that would be helpful to the determination of whether the school had an adequate medical program.

Whether Universidad Nordestana was "listed" by the World Health Organization was debatable and properly subject to initial determination by the medical board regardless of whether the medical board had adopted a rule in this respect. The issue of listing of the Unversidad Nordestana by the World Health Organization is to be determined in the first instance, not by the court, but by the board. The Board did not abuse its discretion in considering the Universidad Nordestana to a medical school

not listed by the World Health Organization nor did the common pleas court abuse its discretion in finding that the board's determination was supported by reliable, substantial, and probative evidence and was in accordance with law. Certainly, the intent of the General Assembly was to protect the citizens of Ohio from medical practice by physicians who had not received appropriate medical training. Based upon the lack of information about the Universidad Nordestana, it may, for all we know, be a Dominican Republic medical school, such as that caricatured in Doonesbury. The only testimony about its program was presented by Dr. Hyde. His testimony was rejected by the Board as being suspect. He was unaware of many of the important details that were covered by the questionnaire that Nordestana failed to return. It is interesting to note that, although as the majority noted, Dr. Hyde passed the E.C.F.M.G. examination, it was after three attempts. He also took the FLEX examinati[illegible] twice before passing it. It

is further noted that Dr. Hyde transferred to Nordestana from Central del Este, another medical school in the Dominican Republic, but one which was listed in the 1970 edition of the World Health Organization directory. Dr. Hyde failed to pass plastic surgery at Central del Este and there were also four or five other courses that he did not pass. He took neurology three times before passing it a Nordestana.

In short, this court is making a grave mistake in substituting its judgment for the State Medical Board to require the Board to license a graduate of a foreign medical school of completely unknown calibre to practice medicine in Ohio.

The judgment of the trial court should be affirmed.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:

Roger Dale Anderson, M.D.	:	
	:	
(State of Ohio, The State Medical Board,	:	NO. 87AP-625
	:	Regular
	:	Calendar
Appellant)	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on July 28, 1988, the third assignment of error is sustained, and the first and second assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court with instructions to order the board to promptly determine whether St. George's University School of Medicine is reputable and in good standing, stating the reasons for such determination, and thereafter the board

shall either grant of deny the application for a temporary license.

STRAUSBAUGH, McCORMAC & BOWMAN, JJ.

By s/s
Judge Dean Strausbaugh

cc: William J. Mooney and
Steven L. Ball
Cheryl J. Nester

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:

Roger Dale Anderson, M.D.,	:	
	:	
Appellant-Appellee,	:	
	:	
(State of Ohio, The State Medical Board,	:	N0. 87AP-625
	:	Regular
	:	Calendar
Appellee-Appellant	:	

O P I N I O N

Rendered on July 28, 1988

MESSRS. MOONEY & BALL, MR. WILLIAM J. MOONEY and MR. STEVEN L. BALL, for appellee.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, and MS. CHERYL J. NESTER, for appellant.

APPEAL from the Franklin County Common Please Court.

STRAUSBAUGH, J.

This is an appeal by appellant, the State Medical Board ("board"), from a judgment of the court of common please in

favor of appellee, Roger Dale Anderson, M.D. The common pleas court reconsidered its prior decision and found that appellant was required to issue a temporary certificated of licensure to appellee.

Appellee is a United States citizen and a graduate of a foreign medical school, St. George's University School of Medicine located on the island of Grenada, West Indies. Following two years of training in the basic sciences at St. George's University, appellee spent one semester on the neighboring island of St. Vincent completing preclinical studies. Thereafter, he completed a forty-two-week rotation in clinical studies at North Middlesex Hospital in London, England. He returned to the United States in January 1983 and completed twenty-two weeks of electives at Riverside Methodist Hospital ("Riverside") in Columbus. Upon completion of these electives, appellee graduated from St. George's University in May 1983.

Following graduation, appellee began an internship in internal medicine at Riverside. In June 1983, appellee filed an application with the board for a temporary certificate enabling him to pursue his internship at Riverside. On August 18, 1983, the board notified appellee that it proposed to deny his application for temporary certificate for the reasons that appellee had not completed on academic year of supervised clinical training in a hospital affiliated with an approved medical school and that appellee had graduated from a medical school which had not been recognized as reputable and in good standing by the medical board pursuant to R.C. 4731.291 and 4731.09(E).

Following a hearing, in December 1983, before a referee of the board, a report issued recommending that a decision on appellee's eligibility for a temporary certificate be withheld until the board had an opportunity to determine if St. George's

University met the standard for accreditation of U.S. medical schools. Subsequently, in October 1984, the board affirmed the report and recommendation of the referee over appellee's objection.

Appellee filed a notice of appeal, pursuant to R.C. 119.12, with the board on November 1, 1984 and with the court of common pleas. The common pleas court, on March 4, 1986, filed a decision affirming the order of the board. Apparently, that decision was never journalized and remained pending on the lower court's docket. Following a decision by this court in December 1986, Hyde v. State Medical Bd. (1986), 33 Ohio App. 3d 309, appellee filed a motion with the common pleas court to reconsider its March 1986 decision. The common please court modified its previous decision, granted appellee's appeal and ordered the board to issue a temporary certificated to appellee. The court overruled appellant's motion to reconsider

and reduced its decision to judgment on June 8, 1987.

Appellant assigns the following as error for our review:

"I. The lower court erred in reversing the decision of the appellant, State Medical Board of Ohio, and ordering the board to grant the appellee's application for temporary certificate under R.C. 4731.291, as such issue is moot.

"II. The lower court erred in reversing the decision of the appellant, State Medical Board of Ohio in regard to the appellee's application for temporary certificate under R.C. 4731.291 on the basis of the decision in Hyde v. State Medical Board (Unreported), case no 86AP-475 (Franklin Cty, C.A., 12/30/86).

"III. The lower court erred in ordering the appellant, State Medical Board of Ohio, to issue a temporary certificate to the appellee in that such order

violated the standard of review set forth in R.C. 119.12 and is in derogation of R.C. 4731.291."

Under the first assignment of error, the board argues that this appeal in now moot. Because a temporary certificate may only be issued for a one-year period, appellant contends that it would be fruitless to remand this matter back to the board to issue the license appellee sought for the period of June 27, 1983 through June 30, 1984. As support for this contention, appellant relies on this court's decision in Hyde, supra, at 314.

Although the Hyde court found Dr. Hyde's second assignment of error to be moot, it did so based upon the disposition of the other errors alleged upon appeal. Id. As such, this court did not address in Hyde the issue raised by appellant's first assignment of error.

This appeal is clearly not moot. Since the board failed to render its decision

denying the temporary certificate within the one year period for which appellee sought a license, it may not now attempt to avoid review of that decision by invoking the doctrine of mootness. Moreover, we are not persuaded that the reversal by the trial court of the board's decision would require it to do a vain thing The board is empowered to renew a temporary license annually for a maximum of five years. R.C. 4731.291(B). The mere expiration of a license which is the subject of an appeal does not affect the appeal. R.C. 119.121. Thus, to the extent the board erred in failing to issue a temporary license to appellee, the court could order the board to renew that license. Id. Therefore, appellant's first assignment of error is overruled.

Next, the board contends that the common please court erred in extending the holding of Hyde, supra to this case. In Hyde, this court held that the board improperly denied

licensure under R.C. 4731.09(B) to an applicant because the board failed to properly promulgate the rule under which it denied the license. Id at 313, 314. It is the board's position that this holding had no application to the issuance of a temporary certificate under R.C. 4731.291.

The portions of R.C. 4731.291 which are pertinent to this appeal provide in part:

> "(A). The state medical board may register, without examination, persons holding either the degree or doctor of medicine or the degree of doctor of osteopathic medicine and surgery who wish to pursue internship, residency, or fellowship programs in this state.
>
> "A applicant for a temporary certificate to practice medicine or osteopathic medicine and surgery shall furnish proof satisfactory to the board that:
>
> "***
>
> "(3) He is a graduate of a medical or osteopathic school or college which, in

the judgment of the board, is reputable and in good standing ***" (emphasis added).

Appellant argues that, because R.C. 4731.291 specifically vest in the board the discretion to determine which medical schools are reputable and in good standing, the Hyde decision has no application since in that case the board had exceeded the mandate of R.C. 4731.09(B).

This court find that the board's reading of the Hyde decision is somewhat limited. Although the Hyde court did conclude that the board had exceeded its authority under R.C. 4731.09(B), the court also invalidated the policy at issue in that case because the board failed to promulgate that policy as a rule under R.C. 119.02. Id at 313. This latter reasoning is applicable to the instant appeal.

The denial of appellee's application for a temporary license was based in part on the same policy which was invalidated in Hyde

supra, because it had not been properly promulgated. As such, to the extent the board relied on this policy in denying the temporary certificate the trial court correctly found that the board's order was contrary to law. The second assignment of error is overruled.[1]

As its final assignment of error, the board contends that because it has not decided whether St. George's University School of Medicine is reputable and in good standing, the common please court erred in ording the board to issue a temporary

[1] This court notes that the board has properly promulgated rules regarding the status of foreign medical schools since oral argument was had in this matter. See Ohio Admin. Code 4731-6-01 through 4731-6-41. Specifically, a foreign medical school is reputable and in good standing, for purposes of issuing a temporary certificate, if it meets the standard set forth in Ohio Admin. Code 4731-6-04(D). Ohio Admin. Code 4731-6-40(B)(1). These standards include the provisions of Ohio Adm. Code 4731-6-06, 4731-6-07, and 4731-6-27. However, because these rules were not in place at the time the board rendered its decision in this matter, the rules may not be applied to this case. We express no opinion as to the retrospective application of the rule otherwise.

certificate to appellee. Ad support for this argument, appellant relied upon State, ex rel. Attorney General, v. Hygeia Medical School College (1899), 60 Ohio St. 122, paragraph one of the syllabus.

Clearly, R.C. 4731.291 vests in the board the power to determine, in the first instance, whether a medical school is reputable and in good standing. Courts may not usurp this function. Hygeia Medical College, supra. The statute directs the board to make that determination. Here, the board has not yet determined whether St. George's University School of Medicine is reputable and in good standing. Thus, the trial court abused its discretion when it ordered the board to issue to appellee a temporary certificate.

The appropriate procedure to be followed is for the trial court to remand this cause to the board to promptly determine whether St. George's University is reputable and in good standing, stating its reasons for the

determination. We note, however, that an order of the board denying a temporary license would not be supported by reliable, probative and substantial evidence if unrebutted expert testimony established the reputability and good standing of St. George's University School of Medicine. Base on the foregoing, appellant's final assignment of error is sustained.

While the first and second assignments of error are overruled, appellant's third assignment of error is sustained. Accordingly, the judgment of the Court of common pleas is affirmed in part and reversed in part and this cause is remanded. Upon remand, the trial court is instructed to order the board to promptly determine whether St. George's University School of Medicine is reputable and in good standing, stating the reasons for such determination. Once that issue is determined, the board shall either grant or deny appellee's application for a temporary license.

Judgment affirmed in part and
reversed in part;
case remanded with instruction

McCORMAC and BOWMAN, JJ., concur.

THE SUPREME COURT OF OHIO

1990 TERM

To Wit: February 7, 1990

ROGER D, ANDERSON, M.D.,	:	
	:	
Appellee,	:	Case No.
	:	No. 88-1701
V.	:	Judgment Entry
	:	Appeal from the
OHIO STATE MEDICAL BOARD	:	Court of Appeal
Appellant.		

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, this appeal is dismissed, sua sponte, as having been improvidently allowed.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the

Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 87AP625)

s/s
Thomas J. Moyer
Chief Justice